PP

v.

LAW FEN KANG

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED JC
[CRIMINAL TRIAL NO: 45-80-2002 (4)]
13 JANUARY 2005

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 34.97 grams of monoacetylmorphines - Prima facie case - Whether accused had possession and knowledge of dangerous drugs in car - Whether to be deemed to be trafficking - Dangerous Drugs Act 1952, ss. 37(da)(iii), 39B(1)(a), 39B2 - Criminal Procedure Code, s. 180*

On approaching a police road block at about 4am along the Mersing-Kota Tinggi road, the accused stopped the car he was driving in order to allow his friend, one Ah Chai, to alight from the car and ease himself. Ah Chai, however, never returned to the car and remained at large. In the meanwhile, the officers from the police party (including PW4) that manned the road block inspected the car and found, from the car's dashboard and below it, 72 plastic packets containing yellowish substance, suspected to be dangerous drugs. The accused was arrested and, upon the 72 plastic packets being confirmed to contain 34.97 grams of monoacetylmorphines, charged with trafficking in the offensive substance under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Before the learned Judicial Commissioner, the question that arose was whether a *prima facie* case of trafficking had been proved against the accused, considering that the prosecution was relying on s. 37(da) of the Act (presumption of trafficking), and that the accused, who was the registered owner of the car, had denied any knowledge of the presence of the dangerous drugs in the car.

Held (acquitting and discharging accused):

(1) For the presumption of trafficking to come into play under the provisions of s. 37(da) of the Act, the accused must be found in possession of the drug. Possession under the provision must be proved by convincing, credible and admissible evidence and cannot arise out of legal presumption. (para 6)

(2) Possession encompasses the element of physical control as well as the element of knowledge. Thus knowledge constitutes an essential ingredient of possession under s. 37(da) of the Act. Knowledge is

A a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. (para 8)

(3) It is an established fact that at the material time the accused was not the sole occupant of the car. There were two occupants in
B the car with the other still at large, with the result that the accused could not be said to have exclusivity to the car. The significance of this is that it is not possible to exclude the possibility that the other occupant, named by the accused as Ah Chai, might have placed the drugs inside the car. (para 9)

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(3a) The court is inclined to accept that Ah Chai is not a fictitious character, since the uncontroverted evidence of PW4 confirmed the existence of another occupant in the car at the relevant time. In the circumstances, the possibility that that other occupant had
D exclusive possession of the drugs could not be excluded. (para 9)

(4) The accused had protested as to his innocence at the very first opportunity. In cross-examination, PW4 agreed that the accused told him that he had no knowledge of the presence of the offending exhibits. He made no difficulties when arrested. He also
E told PW4 the reasons why he had stopped the car at the material time and spot. In addition, no attempt was made to lift fingerprints off the relevant exhibits in which the drugs were found to try to establish that the accused had handled them. (para 9)

F **(5)** Even though the accused was the registered owner and the driver of the car at the material time, it cannot be irrefutably inferred that the accused possessed the requisite knowledge of the presence of the drugs inside his car. The totality of the evidence, the surrounding circumstances and the conduct of the accused taken
G together do not irresistably point to the accused having knowledge of the offending exhibits at the material time. Thus, there was no sufficient evidence to arrive at an affirmative finding that the accused had possession of the drugs in question. The prosecution, in short, has failed to establish a *prima facie* case against the accused. (para 10)

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Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] MLJ 237 ***(refd)***
Leow Nghee Lim v. R [1956] MLJ 28 ***(refd)***
PP v. Looi Kow Chai [2003] 1 CLJ 734 CA ***(refd)***

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Legislation referred to:
Criminal Procedure Code, s. 180(1)
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a), (2)

For the accused - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Mohd Nordin Ismail; DPP

Reported by Rose Aziz

JUDGMENT

Azahar Mohamed JC:

[1] The accused, Law Fen Kang stands charged with an offence of trafficking in 34.97g of monoacetylmorphines on 3 March 2002 at about 4 am at KM 22, Jalan Kota Tinggi/Mersing, Jemaluang, Mersing, Johor, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the act') and punishable under s. 39B(2) of the act thereof. The charge reads as follows:

> Bahawa kamu pada 03 Mac 2002, jam lebih kurang 4.00 pagi, di KM 22, Jalan Kota Tinggi/Mersing, Jemaluang, dalam daerah Mersing, dalam Negeri Johor Darul Ta'zim telah didapati mengedar dadah berbahaya iaitu 34.97 gram monoacetylmorphines dan dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama

[2] At the end of submissions of both learned counsel for the accused and the learned deputy public prosecutor at the close of the prosecution's case on 16 December 2004, I reserved my judgment. The issue before me is whether the prosecution has established a *prima facie* case against the accused in respect of the offence charged. This is now my judgment.

[3] The salient facts adduced by the prosecution are as follows. On 3 March 2002, between 2am and 6am PW4, SM 57940 Abdul Rahman b. Muslim together with PW6, Sjn. 74632 Low Kom Jong and five other police personnel, namely D/Kpl. 116352 Roslan b. Ibrahim, D/L.Kpl. 102599 Zainor b. Nordin, L/Kpl. 74021 Mohd. Jarail b. Mat Umar, Konst. 142099 Zalkhamseri b. Daud, L/Kpl. 99047 Aziz b. Mohamad were on duty along the Jalan Kota Tinggi/Mersing manning a roadblock at KM 22 of the said road for the purpose of checking vehicles passed along the road. According to PW4, 3 'papan tanda' were being set up for the traffic that passed through the said road. In his testimony, PW4 said that at about 4am whilst he and his men were

manning the roadblock he saw the headlights of an approaching car coming from the direction of Kota Tinggi towards the roadblock. Near a papan tanda, which was written 'Awas Pemeriksaan Polis' the car stopped, and the headlights were switched off. PW4 saw someone alighting from the front passenger side of the car. PW4 was suspicious and then he and L/Kpl Zainor approached the car on his motorcycle. When they were near the car they noticed that it bore registration number JGG 3089 with its engine running. The driver of the car was in the driver seat and was subsequently identified as the accused. The accused was the registered owner of the car. When enquired by PW4, the accused responded that he was waiting for a friend who had gone to answer nature's call. Then both PW4 and L/Kpl Zainor saw a red ang pow packet on the driver's side of the dashboard. Upon examining the red packet, PW4 found it to contain a transparent plastics packet suspected to contain dangerous drugs. The discovery of this item led PW4 to conduct a thorough search of the car. PW4 instructed the accused to get out of the car to enable L/Kpl Zainor conducted the search. Below the dashboard behind the radio L/Kpl Zainor found a plastic bag and handed it to PW4. Inside the plastic beg PW4 found many more transparent plastic packets containing yellowish substance suspected to be dangerous drugs. The accused was then put under arrest. The items seized together with the car and the accused were then brought back to the police station where PW4 lodged a police report. At the police station PW4 counted the contents in the plastic bag and found them to contain 71 transparent plastic packets each containing yellowish substance suspected to be dangerous drugs. PW3, Puan Hajjah Shadiah binti Mohamed was a chemist attached to the Chemistry Department, Johore Bahru at the material time. She analyzed the contents of all the 72 transparent plastic packets and found them to contain 34.97g of monoacetymorphines as listed in the first schedule of the act.

[4] What I have set out a moment ago I think form a fair summary of the case for the prosecution upon which each ingredient of the charge must be established in order to make out a *prima facie* case against the accused under s. 180(1) of the Criminal Procedure Code. Since learned counsel for the accused had not raised any issue on the identity of the incriminating exhibits and the testimony of the chemist, I think it is not necessary to advert to that part of the evidence in detail. In his submission at the close of the case for the prosecution, learned counsel for the accused argued that the prosecution had failed to make out a *prima facie* case on the ground that the prosecution had failed to prove possession and that the accused had no knowledge of the presence of the dangerous drugs in the car. As I have stated at the outset, the

charge against the accused is that he did traffic in 34.97g of monoacetylmorphine. From the submission of the learned deputy, it is clear that the accused is being charged with trafficking on the ground that he was in possession of monoacetylmorphine, which exceeded 15g in weight. Thus, it was argued by the learned deputy the accused must be deemed to be trafficking in the said drugs under the provisions of s. 37(da)(iii) of the act.

[5] Before turning to consider and examine the arguments, I should perhaps at this stage refer to the guideline laid down by His Lordship Gopal Sri Ram in *PP v. Looi Kow Chai* [2003] 1 CLJ 734 CA which is in the following terms:

> It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to a maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal

[6] For the presumption of trafficking to come into play under the provisions of s. 37(da) of the Act, the accused must be found in possession of the drug. Possession under the provision must be proved by convincing, credible and admissible evidence and cannot arise out of legal presumption. What constitutes possession? I think a passage in the judgment of Thompson (as he then was) in the case of *Chan Pean Leon v. PP* [1956] MLJ 237 is particularly useful. This is what his lordship said at p 237:

> To establish possession for the purposes of criminal law, two separate questions are involved. The first is whether the accused party was in possession of the article in question and the second, by reason of the application of the maxim *actus non facit reum nisi mens sit rea*, is whether he had knowledge of the thing possessed.

[7] In *Leow Nghee Lim v. R* [1956] MLJ 28 Taylor said at p. 30:

> Probably the most helpful definition of possession is; 'the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the things admits, to the exclusion of other persons'. This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

[8] Possession therefore encompasses the element of physical control as well as an element of knowledge. Thus, knowledge constitutes an essential ingredient of possession under s. 37(da) of the Act. Possession incorporates the element of knowledge and without knowledge there can never be possession under the act. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances.

[9] With that I turn to consider the question whether or not the prosecution has made out a *prima facie* case against the accused. Turning now to the facts of the case before me, it is true that the accused was the driver as well as the registered owner of the car at the relevant time. This would constitute an essential and vital step by the prosecution in the direction to prove its case. Nonetheless, as I have said a moment ago the prosecution must establish that the accused had knowledge of the existence of the dangerous drugs but not as to its qualities. In this regard, PW4 in cross-examination said that the car stopped for about 20 minutes before he and L/Kpl Zainor approached it. PW4 said that during the 20 minutes the accused could have disposed off the red ang pow packet containing the plastic packet and that he could have made a u-turn to flee the area. The evidence adduced did not show that the accused did anything of that sort. Upon being confronted and questioned by PW4 as to why he had stopped his car, the accused answered that he was waiting for his friend who had earlier left the car to answer nature's call. In this regard, PW4 also said that he saw someone alighted from the left front side of the car at the critical time and spot. Hence, it is an established and undisputed fact that at the material time the accused was not the sole occupant of the car. Now, it is clear that there were two occupants in the car. The evidence established that the accused did not have exclusivity to the car. The other occupant is now still at large. And it is significant to note that the other occupant did not return after he earlier left the car. The significance of this is that it is not possible to exclude the possibility that the other occupant could have placed the drugs inside the car. PW4 also said that the accused told him that the other occupant who had earlier left the car was one Ah Chai. The accused informed PW4 that he and Ah Chai were coming from Johore Bahru. After considering all the evidence led by the prosecution up to the close of its case, I am inclined to accept that Ah Chai is not a fictitious character invented by the accused. The uncontroverted evidence of PW4 confirmed the existence of another occupant in the car at the relevant time. There is another aspect of this case, which I think is important. Despite the fact that PW4 was suspicious yet no attempt or effort was made by him or his men at the material time to locate the other occupant of the car. In the

circumstances of this case, the possibility that the occupant had exclusive possession of the drugs cannot be excluded. In this regard, I would like to say something about the conduct and behaviour of the accused at the relevant time. The accused protested as to his innocence at the very first opportunity. In cross-examination, PW4 agreed that the accused told him that he had no knowledge of the presence of the offending exhibits. He made no difficulties when arrested. He told PW4 as to the reason why he had stopped the car at the material time and spot. In addition to what I have said, I also observed that no attempt was made to lift fingerprints off the relevant exhibits in which the drugs were found to try to establish that the accused had handled them. There is one other matter that I think I need to address. The cautioned statement of the accused had been tendered by the defence and admitted through Insp. Abdul Halim b. Harun, PW7, the investigating officer. However, it has not been tested by cross-examination. Thus, it cannot form the basis of an acquittal of the accused.

[10] In my judgment from the totality of the evidence adduced in the course of the prosecution's case, which I have discussed and reviewed earlier, there is more than one way in which the evidence with regard to the element of knowledge of the accused of the drugs can be viewed. To my mind even though the accused was the registered owner and the driver of the car at the relevant and material time, it cannot be irrefutably inferred that the accused possessed the requisite knowledge of the presence of the drugs inside his car. I have come to this conclusion after I have carefully considered all the surrounding circumstances, his conduct and his behavior together with the fact that he was not the sole occupant of the car. In my judgment the totality of the evidence, the surrounding circumstances and the conduct of the accused when taken together do not irresistibly point to the accused having knowledge of the offending exhibits at the material time. There is a reasonable doubt whether the accused knew there were drugs inside his car at the material time. Thus, in my judgment there was no sufficient evidence, whether of a direct or inferential nature, to arrive at an affirmative finding that the accused was found in possession of the drugs so as to bring the presumption of trafficking into play. In this regard, His Lordship Augustine Paul speaking for the Federal Court in the case of *Balachandran v. PP* [2005] 1 CLJ 85 FC reminded us on the standard of proof at the close of the case for the prosecution. His lordship statement of the law on the test is at p. 98:

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> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

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[11] In the result, it is my finding that the prosecution has failed to make out a *prima facie* case against the accused. Accordingly, I acquit and discharge the accused without calling upon him to enter his defence.

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